Scribbles Squibs #30 (October17, 2014):*

LIABILITY FOR JOB SITE ACCIDENTS: PART ONE – SOME OF THE BASICS AND THE ISSUE OF RETAINED CONTROL

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I. INTRODUCTION.

In this *Squib,* we want to address three questions. *First*, is an employer generally liable for tort claims from its employees and their families? *Secondly,* what parties *are* liable for job site accidents other than an employee's employer? To understand the answer, we will briefly discuss issues such as contributory negligence, assumption of the risk and comparative negligence, which are the bread and butter issues of the answer. *Thirdly,* we will discuss the concept of 'retained control' as recently discussed in a prominent Massachusetts court case. In subsequent *Squibs,* we will address other aspects of these issues and, where possible, we'll try to answer a question you might have in another installment of this series.

II. IS AN EMPLOYER GENERALLY LIABLE FOR TORT CLAIMS FROM ITS EMPLOYEES?

The answer to this is generally 'no'. Only because this is somewhat complicated, the easiest way to explain this is to simply provide you with the statute saying so, which is M.G.L.A. 152 § 24, Waiver of right of action for injuries, which provides:

> "An employee shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury that is compensable under this chapter, to recover damages for personal injuries, if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person or self-insurer, if the employee shall not have given the said notice **within thirty days** of the time said employer became an insured person or self-insurer. An employee who has given notice to his employer that he claimed his right of action as aforesaid may waive such claim by a written notice, which shall take effect five days after it is delivered to the employer or his agent. The notices required by this section shall be given in such manner as the department may approve. If an employee has not given notice to his employer that he reserves his right of action at common law as provided by this section, the employee's spouse, children, parents and any other member of the employee's family or next of kin who is wholly or partly dependent upon the earnings of such employee at the time of injury or death, shall also be held to have waived any right created by statute, at common law, or under the law of any other jurisdiction against such employer, including, but not limited to claims for damages due to emotional distress, loss of consortium, parental

guidance, companionship or the like, when such loss is a result of any injury to the employee that is compensable under this chapter." (Emphasis added)

Simply put then, an employee has to make a decision when he/she is hired. Do I want to be able to sue my employer if I get hurt or do I want to be able to receive workmens' compensation benefits should I get hurt? One can't have both. Life being as it is, in all likelihood, a prospective employee will not know that this choice even exists. If he/she does not make the choice at the time of his/her contract of hire that he/she wants to be able to sue his/her employer advising the employer of this in writing, he/she is automatically covered by workmens' compensation insurance, which choice or *de facto* choice will also bind his/her family members.

Having said all of this, there may be some exceptions to this. The key thing about workmens' compensation claims is that they generally must 'arise out of or be in the course or scope of employment' resulting in some physical injury *to the employee*. Certain injuries could happen that would not necessarily prevent the employee or his family from suing the employer. Examples?

There have been court cases where the plaintiff employee is off of the employer's premises when injured or he/she is injured before or after work or even during working hours when on a personal errand. If such are not 'covered claims' by the workmens' compensation carrier, there may be an opportunity to sue one's employer

A spouse might have some claim against the employer where his/her claim does not depend on the other spouse's incurring an injury. For example, this act may not bar an action by a wife for asbestosis which she contracted from exposure to asbestos dust on her husband's work clothes or from walking by a construction site at which her husband worked spraying asbestos fireproofing on steel beams. These type of claims would seem fairly unlikely but at least possible.

In today's day and age where many women make more money than their husbands, there might be a further exception. Namely, the statute applies to a spouse who is "wholly or partly dependent upon the earnings of such employee at the time of injury or death." What if the spouse making the claim is not dependent on the injured spouse *at all?*

Since possible exceptions occur to very ingenious lawyers willing to attempt to extend potential remedies – and to courts not being opposed to extending a workmens' compensation's insurer's exposure – other exceptions may exist already or be fashioned in future litigation.

All of that being said, we still have the near absolute bar of claims for an employee and his/her family where that employee has not specifically opted out of the workmens' compensation statute in the method set forth above.

III. THIRD PARTY LIABILTY FOR CONSTRUCTION JOB SITE INJURIES: A TALE OF CONTRIBUTORY NEGLIGENCE, ASSUMPTION OF THE RISK, COMPARATIVE NEGLIGENCE AND SUBCONTRACTOR INDEMNITY OBLIGATIONS AND OTHER THINGS REALLY *EASY TO UNDERSTAND.*

As I'm sure you realize, this is complicated. In order to more thoroughly understand this, I have to explain some legal principles which existed at 'common law' (judge-made law through court decisions). Then, I'll explain how this was changed in Massachusetts through 'statutory law' (laws passed by the legislature). I think it's important to fairly clearly understand this, as this will demonstrate why paying attention to indemnity language and agreements with appropriate insurance products and coverage amounts in contracts is so important. As a long-time construction lawyer, teacher and writer on construction law subjects, I am confident I have more than enough ability to be able to explain some of these things to you. On the plus side, this is, after all, not my first rodeo. On the negative side, this may not be of any assistance to you if you unless you are either a cowboy or a horse . . . . Moving right along. . . .

A. CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF THE RISK.

At common law, there were two principles of law that might apply to a person who received physical injuries: contributory negligence and assumption of the risk. Their existence in any particular physical injury situation could prevent that party from being able to sue.

'Contributory negligence' is generally defined as where the plaintiff's (injured party's) own negligence played a part in causing his/her injury. If the part played was significant enough, in some jurisdictions, this would bar the plaintiff from recovering damages. In researching this article, I found a 1980 Supreme Judicial Court case holding that the plaintiff's contributory negligence was an absolute bar to the plaintiff's claim for recovery for personal injuries. This case did involve aspects of construction, although the plaintiff was not a construction worker.

'Assumption of the risk' can be defined as a prospective plaintiff's taking on the risk of loss, injury or damage. For example, a skydiver assumes the risk of his/her parachute not opening, thus receiving injury or death. This occurs where that individual's own negligence did not play a part in causing the accident. After all, he/she didn't pack the parachute. In a construction-related case also decided by the Supreme Judicial Court, the Court said: "The doctrine of assumption of the risk, long recognized in the common law of Massachusetts, can be summarized in the following terms. "One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure." (case cited). The basis for denying recovery is expressed in the maxim that he who consents cannot receive an injury."

What we already know from a discussion of workmens' compensation law above is that, generally speaking, a company's own employees cannot sue it unless the employee has opted out of the workmens' compensation plan, which probably almost never happens for two reasons.

First, the employee doesn't know he/she has the right to do so. And, secondly, generally speaking, when an employee is hurt, he/she would rather have these benefits *now* while they are really needed rather than wait five years for their rights to be decided by twelve people too dumb to get out of jury service!

Massachusetts passed several statutes putting the defending subcontractor or general contractor in a more difficult position with regard to construction job site accident personal injury claims, which laws greatly eroded the two concepts discussed above.

B. COMPARATIVE NEGLIGENCE.

The first statute is M.G.L.A. 231 § 85. Comparative negligence; limited effect of contributory negligence as defense:

> **"Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought**, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred per cent. . .
>
> **The defense of assumption of risk is hereby abolished in all actions hereunder."** (Emphasis added)

So, what this statute does is entirely abolish the defense of assumption of risk and seriously curtail the defense of contributory negligence. And, this statutory scheme allows a person who did contribute to his/her harm to recover damages as long as the plaintiff's negligence is no more than 50% of all factors causing the harm. When the percentage of the plaintiff's contribution is up to 50%, whatever recovery that person gets is reduced by that percentage. So, if a plaintiff recovers two million dollars in damages as awarded by judge or jury being 50% liable for causing the harm, then the plaintiff only receives one million dollars. Once the plaintiff's percentage of causing the harm reaches 51% of all factors causing the harm, the plaintiff is entitled to no recovery at all.

The second statute is M.G.L.A. 231B § 1 M.G.L.A. 231B § 1. Right of contribution; subrogation:

> "(*a*) Except as otherwise provided in this chapter, where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them.

(*b*) The right of contribution shall exist only in favor of a joint tortfeasor, hereinafter called tortfeasor, who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share. No tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire liability . . . .

(*e*) **This chapter shall not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee shall be for indemnity and not contribution, and the indemnity obligor shall not be entitled to contribution from the obligee for any portion of his indemnity obligation**." (Emphasis added)

One of the things this statute means is that even if some of the rules for negligence liability have been changed, they don't affect indemnity obligations assumed under contracts, which rights are *contractually*-based, not *tort*-based. This simply means that if you sign a contract with an absolutely strong indemnity obligation, then you are assuming that right of indemnity should a physical injury occur. (We'll save a discussion on the issue of contribution to a future *Squib* in this series.)

The third statute is M.G.L.A. 231B § 2 Pro rata shares of tortfeasors in entire liability; determination

"In determining the pro rata shares of tortfeasors in the entire liability (a) **their relative degrees of fault shall not be considered**; (b) if equity requires, the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply." (Emphasis added)

This one is tough. What this means, as to any plaintiff, is that if three defendants are liable to a plaintiff for an injury – one causing 48% of the harm, the second causing 49% of the harm and the third causing only 3% of the harm – as to the plaintiff, they are all equally liable for the damages the plaintiff sustains.

Massachusetts does not have 'comparative comparative negligence', meaning that the party causing 3% of the harm only has to pay 3% of the damages. Therefore, if a jury found in a Massachusetts negligence case that one defendant contributed to the harm as little as one percent, this defendant is equally liable for the plaintiff's damages with other defendants.

How can this be fair? I infer that an underpinning of the Massachusetts scheme is to take advantage of whatever insurance each of the defendants might have which could respond to the plaintiff's recoverable damages.

In a construction setting, as to an employee of a sub-subcontractor (or of a subcontractor), it is hard to imagine that any subcontractor with which a sub-subcontractor contracted and/or the general contractor for the project at issue as to subcontractors and sub-subcontractors wouldn't have at least one percent contribution to a plaintiff construction worker's personal injury damages. This is because the general contractor is usually liable for

coordination, compliance with all applicable safety rules and regulations and the general supervision of all construction work. Since all of these general contractor obligations are incorporated by reference into any typical subcontract, as to sub-subcontractors, a subcontractor would have some of these obligations also. There is such an abundance of complex state and federal safety statutes and regulations that many subcontractors and general contractors (and, possibly, even some of their lawyers!) are not fully aware of all of them and/or to be in a position to comply with or enforce all of them.

This makes having comprehensive indemnity obligations, secured by a reasonable amount of insurance with appropriate coverages, in all of one's downstream contracts absolutely critical. Subcontractors, in light of this, it's especially important that you be aware of the following:

C. THE ONLY INDEMNITY OBLIGATION STATUTORILY REQUIRED OF SUBCONTRACTORS.

This is established by statute, M.G.L.A. 149 § 29C Indemnification as part of contract:

> "Any provision for or in connection with a contract for construction, reconstruction, installation, alteration, remodeling, repair, demolition or maintenance work, including without limitation, excavation, backfilling or grading, on any building or structure, whether underground or above ground, or on any real property, including without limitation any road, bridge, tunnel, sewer, water or other utility line, which requires a subcontractor to indemnify any party for injury to persons or damage to property **not caused by the subcontractor or its employees, agents or subcontractors**, shall be void." (Emphasis added)

Note that this does not say, as many subcontracts do, that the indemnity is owed even when the party to be indemnified (either the general contractor or the owner) 'partially' contributed to the harm. The subcontractor's obligation to indemnify is one of the most frequently litigated and appealed legal issues. Some case law suggests that a subcontractor might waive this statutory protection if the subcontractor agrees to a stricter requirement. Therefore, it is important for subcontractors to be aware of their rights under this statute and to try to assert them when general contractors insist on more. A subcontractor might argue that for a general contractor to insist on more is an unfair and deceptive trade practice which, if the general contractor persists, might result in a claim for triple damages under MGL C. 93A, s. 11. A general contractor, on the other hand, might say that inasmuch as the general contractor is being held to this requirement under the terms of the general contract with attendant general conditions, since the subcontract incorporates by reference the general contract, you can't do this job unless you agree to what *I* have had to agree to. Like so many other things in life, sometimes the one who blinks last is the one who succeeds. Is either position necessarily right? What, after all of this time and after all of these articles, you think I know *everything?*

Based on the state of negligence law, what is in *any* indemnity obligation as expressed in a contract is something to be thoroughly studied, as thoroughly understood as possible and something that is secured by a sufficient amount of insurance in terms of specific coverages and

in amounts that are likely to cover any physical injury. It may be wise for a subcontractor or a general contractor to look at a contract with a relatively nominal amount of insurance coverages and/or low insurance amounts not to think 'here is where I can save some money'. The amount of insurance that you carry should be sufficient to cover anticipated harms. Discussing insurance requirements and to what extent they will fund your indemnity obligations with a good construction insurance agent *before* you sign the contract is something that can't be done *after*. You don't know who the good construction insurance agents are? Give me a ring, email-wise speaking, letting me know where your office is and roughly what area of the state you work in and I'll give you a name/some names.

IV. THE ISSUE OF 'RETAINED CONTROL'.

In a recent Suffolk Superior Court case and decision, the Plaintiff erected with a fellow employee some scaffolding in order to perform his employer's work at Project. Plaintiff's employer had a direct contractual relationship with the owner of the home in question to perform certain woodworking services directly for the Owner relative to some renovations and an addition Owner was going to have performed on his house, which contract we'll call 'the wood-working prime contract'. Because this work was directly with the owner, it can only be seen as a general contract or a prime contract. The majority of the home renovations were going to be performed by a separate general contractor (and its subcontractors), which had a separate general contract with the Owner – 'the general contract' - for everything but the woodworking.

The Plaintiff fell off of the scaffolding and broke an ankle and sued a variety of parties, including a subcontractor (to the other general contractor), the general contractor and the general contractor's supervisor for negligence. The evidence was such that the other subcontractor, the general contractor and its supervisor not only didn't supervise the wood-working work but were not even aware of the fact that a scaffold was being erected.

The wood-working contract was entered into before the Owner entered into the general contract.

The general contract stated that while Owner had the right to either perform other aspects of the work other than that contained in the general contract with its own forces or to award such other construction work there might be to other contractors, the Owner would have to perform in either case all of the same functions as the general contractor would have to perform under the general contract. Of relevance to this action, the general contractor under the general contract had to provide various duties including 'hiring and supervising subcontractors, as well as oversight of subcontractors' workmanship and safety.'

The issue, then, was whether or not any of the defendants owed any duty of care to the Plaintiff based solely on negligence legal principles. 'Negligence' is defined as: "*Conduct that falls below the standards of behavior established by law for the protection of others against unreasonable risk of harm. A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances".* (The Free Dictionary by Farlex.) A way of understanding the differences between liabilities which

arise under contract as compared with those which arise under negligence principles is that contractual obligations and liabilities are generally contained in some form of contract, usually a written contract. Negligence principles, however, arise not out of contracts but as are implied by or imposed by law.

Potentially, there were four potential issues of material fact and/or facts underlying potential liability with regard to the Defendants as to the Plaintiff. *First*, on one occasion, the general contractor's supervisor may have made negative comments to Plaintiff's employer as to some woodworking done with regard to the front door of the home in question and that this individual told Plaintiff's employer to 'change it'. *Secondly*, the general contractor and its supervisor may have instructed Plaintiff's employer and others 'on how to do their job or to stop doing something and do something else.' *Thirdly*, Plaintiff's employer would discuss with some of the "workers and trades" on site coordination of its schedule with them. The evidence was clear, however, that Plaintiff's employer did not attend weekly progress meetings held by the general contractor where various job issues would be discussed by the general contractor and its own subcontractors. *Fourthly*, Plaintiff's employer did discuss scheduling issues at times with the general contractor or its representatives.

The Court said that none of the various activities in the previous paragraph was sufficient to establish that any of the Defendants 'retained control' over Plaintiff's work from which they might assume a duty of care to Plaintiff's employer or to the Plaintiff. The Court found significant in its considerations that the Restatement of Torts (ED: a cross between a legal encyclopedia and a 'model law', being a proposed law created by legal writers without reference to any particular state) states that it is not enough to establish retained control that the general contractor 'has merely a general right to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which need not necessarily be followed, to prescribe alterations or deviations.' And, since the available evidence indicated that Plaintiff's employer was 'entirely free to do the work its own way', there was no evidence that the Defendants retained control of Plaintiff's employer's work, at least as with regards to the accident at issue.

For these and other reasons and arguments the Court allowed the several motions for summary judgment, which ended the case as to these Defendants. (For those not familiar with this term, there is an article on the litigation process contained in the construction articles section of our website.)

I find nothing here at odds with construction law and comparative negligence law as I understand them. The wood-working prime contract and the general contract were each separately with the Owner, not intertwined or inter-related. No Defendant had anything to do with setting up the scaffolding on the day in question, which scaffolding was presumably owned or rented by Plaintiff's employer. The erection was entirely done by Plaintiff's employer through the efforts of Plaintiff and a fellow employee. Such efforts were not under the direction or control or even knowledge of any of the Defendants.

While a contractual duty of care specifically provided for in a contract may not be exactly the same thing as a duty of care implied by law with regard to a negligence claim, neither existed under the facts of this case. Although not specifically commented on by the Court, it is hard to

imagine that the Plaintiff's own comparative negligence would be less than 51%, which would otherwise preclude a negligence recovery. Since the Owner had a general contractor's obligations to supervise the work of the wood-working prime contract based on the terms of the general contract, to do so was the Owner's obligation only, not that of the general contractor's.

V. CONCLUSION.

Lessons to be learned from this case? Obviously, this is a kind of factual picture that won't occur very frequently. Still, on public work – I am thinking building schools – the owner may have various packages separate and distinct from the general contract, such as audio/visual and communication packages. In addition, while the general contract is ongoing – hopefully, at the latter stages of the job – the owner will have various furniture and equipment delivered, such as desks, chalk boards, etc.

While a general contractor will usually want to direct everything occurring on the jobsite, in situations where people are supplying labor and materials to the project other than through the general contract, trying to direct these third party suppliers and labor suppliers as to the particulars of their work could be interpreted as attempts at 'retaining control', which might be sufficient to attribute responsibility to the general contractor for personal injury claims incurred by employees of the labor and material suppliers who are not working under the general contract.

Generally speaking, as to the issues discussed earlier in this *Squib*, the fact that a subcontractor or a general contractor need only be one percent responsible for a personal injury accident to be liable for an equal share of damages makes it abundantly clear that having the best possible indemnity language in your contracts is a key necessity. And, such agreements need to be funded by responsive insurance coverages in appropriate amounts to the greatest extent possible. To the extent your company is likely to be the party responsible for supplying this indemnity language, care – and guts, in terms of resisting assuming potentially too much exposure in your contract language – have to be applied to this potential issue to try to achieve the best possible result for your company should an accident happen.

As this will be a continuing series, if you send us questions concerning this subject matter, we'll see if we can work the answers into a future segment on this subject.

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

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